No. 02-857

In The Supreme Court of the United States

HOUSEHOLD CREDIT SERVICES, INC.
AND MBNA AMERICA BANK, N.A.,

Petitioners,

v.

SHARON R. PFENNIG,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR THE AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, CONSUMER BANKERS ASSOCIATION, MASTERCARD INTERNATIONAL INC., AND VISA U.S.A. INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the court of appeals erred in refusing to defer to the Federal Reserve Board's duly promulgated and longstanding regulation under the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, that classifies a fee for exceeding a credit limit as not part of the "finance charge."

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INTEREST OF *AMICI CURIAE*[1]

This case involves the validity of a regulation of the Board of Governors of the Federal Reserve System (Board or Federal Reserve Board) promulgated pursuant to its authority to effectuate the purposes of the Truth in Lending Act (TILA), 15 U.S.C. § 1601 *et seq.* The regulation provides that an over-the-limit fee (*i.e.,* a fee charged by a creditor, such as a credit card issuer, to a consumer who exceeds the credit limit applicable to his credit account) is not part of the "finance charge." 12 C.F.R. § 226.4(c)(2). Rather, the regulation requires the disclosure of an over-the-limit fee on periodic statements as an "other charge." 12 C.F.R. § 226.7(h). Respondent brought the instant action against two credit card issuers claiming that their adherence to the Board's regulation and consequent disclosure on her billing statements of an over-the-limit fee as an "other charge," rather than as part of the "finance charge," violated TILA.

Amici include associations whose members issue credit cards and establish other credit accounts that are subject to the requirements of the Board's regulation. The American Bankers Association is the principal national trade association of the banking industry in the United States, representing approximately 90 percent of the domestic assets of United States banks. The Consumer

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[1] Letters from the parties consenting to the filing of this brief are being filed with the Clerk along with this brief, as required under Rule 37.3(a). Pursuant to Rule 37.6, *amici* state that counsel for the parties did not author this brief in whole or in part, and no one other than the *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

Bankers Association represents most of the nation's largest bank holding companies, institutions holding two-thirds of the industry's total assets. Its member institutions are leaders in the provision of consumer finance, including credit cards. The American Financial Services Association is a nationwide trade association that represents approximately 360 companies operating more than 10,000 offices engaged in the extension of consumer credit throughout the United States. MasterCard International Incorporated is a global membership organization comprised of financial institutions that are licensed to use the MasterCard service marks in connection with a variety of payment systems, including credit card programs. Visa U.S.A. Inc. is part of a worldwide association of more than 21,000 financial institutions that individually offer Visa-brand payment services, including Visa-brand credit cards.

Amici have a strong interest in the Court's upholding the validity of the Board's regulation and thereby avoiding the customer confusion and the creditor uncertainty and liability that would otherwise result. The court of appeals' ruling requires disclosure of an over-the-limit fee as a finance charge in "those instances in which the creditor knowingly permits the credit card holder to exceed his or her credit limit and then imposes a fee incident to the extension of that credit." Pet. App. A15 n.5. Imposition of that "knowingly" standard would create extraordinary difficulties for *amici* and their members. The authorization process for credit transactions does not allow credit card issuers to know with any degree of certainty, at the time of a transaction, whether a particular transaction will cause the account to exceed the applicable credit limit. Nor can credit card issuers simply treat all over-the-limit fees as part of the "finance charge" because the court of

appeals expressly recognized that the Board's regulation validly classifies over-the-limit fees that are not "knowingly" imposed as not part of the finance charge. Under such circumstances, disclosure of "other charges" as part of the "finance charge" could violate TILA. Accordingly, *amici* submit this brief based on their long and substantial experience in dealing with the regulations at issue to demonstrate that the court of appeals' ruling should be reversed.

SUMMARY OF ARGUMENT

The court of appeals erred in rejecting the Federal Reserve Board's regulation that classifies over-the-limit fees as not part of the "finance charge" under the Truth in Lending Act (TILA) and substituting in its place a standard that is certain to destroy uniformity of disclosure and create customer confusion. TILA imposes on credit card issuers an extensive series of disclosure obligations relating to the fees and charges imposed as an incident to, as a part of, or in connection with, credit plans. These uniform disclosure obligations are designed to help consumers compare the cost of credit under different credit offerings. In particular, TILA requires that lenders who extend credit to consumers explain the costs of their credit by disclosing the applicable "finance charge" and an annual percentage rate (APR) based on the finance charge, and also inform the consumer about "other charges" imposed as part of a credit plan. 15 U.S.C. § 1637.

A. In enacting TILA, Congress recognized the difficulty of conveying complex credit information to customers in a comprehensible manner. It "determined to lay the structure of the Act broadly and to entrust its

construction to an agency with the necessary experience and resources to monitor its operation." *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 365 (1973). Congress selected the Federal Reserve Board, an agency well-versed in banking transactions, to exercise authority to issue regulations. Pursuant to that authority, the Board promulgated Regulation Z, 12 C.F.R. Part 226, including a provision that classifies an over-the-limit fee as not part of the finance charge, 12 C.F.R. § 226.4(c)(2).

This Court recognized in *Mourning* and *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980), the exceptionally broad authority that Congress expressly vested in the Federal Reserve Board under TILA, including explicit authority to fill gaps in the statute through its Regulation Z, and held that even an interpretation by the Board's staff is controlling unless "demonstrably irrational" *Id.* at 565. Subsequently, this Court has reaffirmed the high degree of deference due an agency, like the Federal Reserve Board, that is vested by Congress with explicit regulatory authority greater than that typically granted by Congress. The Court has held that, in such instances, the agency's duly promulgated regulation is "binding in the courts" unless "manifestly contrary to the statute," thus according it a higher degree of deference than that accorded regulatory action under the more common *Chevron* standard. *See United States v. Mead Corp.*, 533 U.S. 218, 227 (2001); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

Congress granted the Federal Reserve Board explicit authority to fill statutory gaps regarding whether particular fees and charges are part of the "finance charge" or are "other charges." In Section 1604(a) of TILA, Congress granted the Board express authority to make

"classifications," "differentiations," and "exceptions" in a manner that the Board, in its judgment, deems proper to effectuate the statutory purpose or facilitate compliance. In enacting the Truth in Lending Act Amendments of 1995, Congress confirmed that TILA grants to the Federal Reserve Board the authority to promulgate regulations classifying whether certain fees and charges are part of the "finance charge" and to except fees and charges therefrom. Other provisions of TILA bear on that authority by, for example, requiring disclosure of "other charges" and leaving it to the Board to determine the contours of such charges. 15 U.S.C. § 1637(a)(5).

B. The Board's duly promulgated regulation classifying over-the-limit fees as not part of the finance charge is neither manifestly contrary to TILA nor demonstrably irrational and thus is controlling.

TILA defines "finance charge" as the "sum of all charges" that are "imposed * * * as an incident to the extension of credit." 15 U.S.C. § 1605(a). That definition does not, by its terms, require that over-the-limit fees be classified as part of the finance charge. Moreover, by listing examples of fees both within and outside the "finance charge," the structure of the definitional provision itself demonstrates that Congress did not expect the general language of the definition to clearly resolve the question whether various fees and charges are, in fact, imposed "as an incident to the extension of credit" and, thus, constitute part of the "finance charge."

Furthermore, other provisions of TILA strongly indicate that the general definition of "finance charge" was not intended to require that over-the-limit fees be included as part of that charge. As noted above, Section 1637(a)(5)

requires disclosure of "other charges which may be imposed as part of the plan." Also, Section 1637(c), explicitly recognizes that credit obtained under a charge card may be subject to an "over-the-limit" fee, even though "charge card" is defined to mean a card which is not subject to a finance charge. Section 1637(c) also labels over-the-limit fees as "other information" and describes such fees as being imposed "in connection" with an extension of credit, rather than the narrower "as an incident to" language used in the finance charge definition. In view of these many features of TILA's text and structure, it cannot be said that Section 1605(a) unambiguously includes over-the-limit fees as part of the finance charge. For these reasons, the statutory definition of "finance charge" is ambiguous and the Board's regulation is not manifestly contrary to the statute.

The Federal Reserve Board's regulation at issue here was lawfully promulgated and is not demonstrably irrational. The regulation was promulgated pursuant to formal notice-and-comment rulemaking, 5 U.S.C. § 553, as part of the Board's complete revision of Regulation Z in 1981. The Board's decision to require disclosure of over-the-limit fees not as part of the finance charge is plainly rational given the varied circumstances in which they arise and is a classic example of the Board filling a statutory gap by making classifications to effectuate the purposes of TILA.

The court of appeals' contrary approach introduces an issue of "knowingly" into the determination whether an over-the-limit fee is part of the finance charge. But mandating such a case-by-case determination would mean that an over-the-limit fee sometimes would be classified as part of the "finance charge" and included in the APR on a

consumer's periodic billing statement, but at other times would be classified as an "other charge" and not included in the APR. Such results are contrary to the clear and predictable disclosures Congress intended. Moreover, as a practical matter, the existing authorization systems used by credit card issuers and merchants cannot, and are not designed to, determine whether a particular charge, at a given time, will cause an account to exceed its credit limit. Indeed, in promulgating its 1981 revisions to Regulation Z that are at issue here, the Board rejected basing disclosure requirements on the understanding of individual parties and, instead, relied on the obligations to which consumers can be legally bound.

Finally, the Board's determination that an over-the-limit fee should not be disclosed as part of the finance charge rationally furthers the interests of consumers. The Board classifies such a fee as an "other charge" that must be separately disclosed, which means that the nature and amount of an over-the-limit fee is highlighted for the consumer on his periodic billing statement and can be easily compared to similar fees under other credit offers or plans. Treating such a fee as a finance charge, by contrast, would distort the APR, which is based on the finance charge, for the billing cycle in which it is imposed and would likely confuse consumers.

ARGUMENT

THE FEDERAL RESERVE BOARD'S REGULATION CLASSIFYING AN OVER-THE-LIMIT FEE AS NOT PART OF THE "FINANCE CHARGE" IS ENTITLED TO DEFERENCE

Respondent, a credit card holder, complains that the manner in which her credit card issuer disclosed on her periodic billing statements that it was imposing an over-the-limit fee because she had exceeded the credit limit violated the Truth in Lending Act (TILA), 15 U.S.C. § 1601 *et seq.* Pet. App. A3. There is no dispute that the credit card issuer clearly disclosed on respondent's billing statements the fact that the fee was imposed and the full amount of the fee. Respondent alleges, however, that the statute required her credit card issuer to classify the fee not as an "other charge," as the Federal Reserve Board's regulation requires, 12 C.F.R. §§ 226.4(c)(2), 226.7(h), but as part of the "finance charge" on her billing statements and to include it in the annual percentage rate (APR) calculation. Pet. App. A4.

The court of appeals agreed with respondent based on its own assessment of which classification would provide better information to respondent and other consumers. The court of appeals erroneously found TILA's definition of "finance charge" to be unambiguous and, at the same time, imposed an unworkable "knowingly" standard. That standard requires disclosure of an over-the-limit fee as part of the finance charge in "those instances in which the creditor knowingly permits the credit card holder to exceed his or her credit limit and then imposes a fee incident to the extension of that credit." Pet. App. A15 n.5. If such a case-by-case determination were required, however, the usefulness of the APR disclosure would be

diminished, and it would be more difficult for consumers to understand the imposition of over-the-limit fees in their current accounts. The court of appeals' second-guessing of the Board's regulation should be reversed to avoid such consequences that are contrary to the purposes of TILA.

A. Congress Granted The Federal Reserve Board Exceptionally Broad Regulatory Authority Under TILA And The Board's Determination Whether A Particular Type Of Fee Is Part Of The "Finance Charge" Is Entitled To Deference Unless Manifestly Contrary To The Statute Or Demonstrably Irrational

1. Congress declared that its purpose in enacting TILA was "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices." 15 U.S.C. § 1601(a). TILA imposes on credit card issuers an extensive series of disclosure obligations relating to the fees and charges imposed as an incident to, as a part of, or in connection with, credit plans. TILA requires lenders that extend credit to consumers to explain the costs of their credit by disclosing the applicable "finance charge" and the APR based on the finance charge.[2] 15 U.S.C. § 1637. TILA also requires the lenders

[2] The APR listed in solicitations and advertisements reflects the interest rate that will be applied to any outstanding balance that the consumer may have in the future and typically is not tied to a specific loan amount. 15 U.S.C. § 1606; 12 C.F.R. § 226.14. In periodic billing

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to inform the consumer about "other charges" imposed as part of the credit plan. *Ibid.* Those requirements potentially apply to a wide variety of charges and fees that are imposed by credit card issuers. Creditors are constantly creating new credit products that have different features and they must be able to determine whether they are obliged to disclose the various terms of their credit products as part of the finance charge or as an other charge under TILA. These uniform disclosure obligations are designed to help consumers compare the cost of credit under different credit offerings. *See, e.g.*, S. Rep. No. 96-73, at 2 (1979) (suggesting that consumers would benefit from "heightened competition which would result from more knowledgeable credit shopping").

Therefore, in establishing those disclosure obligations, Congress "had to deal not only with the myriad forms in which credit transactions then occurred, but also with those which would be devised in the future." *Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356, 365 (1973). Congress recognized the difficulty of conveying complex credit information to customers in a comprehensible manner, including the need to avoid diluting the most important information that enables comparison shopping by disclosing too much detailed information. S. Rep. No. 96-73, at 3 (noting need to avoid providing consumers too much information that discourages them from studying the disclosure, and citing psychologist testimony about the "problem of 'informational overload'" which was an issue

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statements, however, the APR is calculated based on the actual balance in the account and the actual finance charge imposed during the billing cycle.

with the then-typical statement). Finally, Congress appreciated the importance of credit institutions and personal finance to the Nation's economy, expressly finding that "economic stabilization would be enhanced and the competition among the various financial institutions and other firms * * * would be strengthened by the informed use of credit." 15 U.S.C. § 1601(a); *see also Mourning*, 411 U.S. at 364 (explaining that TILA was enacted to address consumer ignorance of credit charges, and citing testimony that "such blind economic activity is inconsistent with the efficient function of a free economic system such as ours") (citation omitted).

In light of the difficulty of identifying, anticipating, and then appropriately classifying the variety of charges that may relate to a credit transaction, including new types of charges that arise with new credit products, Congress "determined to lay the structure of the Act broadly and to entrust its construction to an agency with the necessary experience and resources to monitor its operation." *Mourning*, 411 U.S. at 365. Congress wisely determined that an agency well-versed in banking transactions should be responsible for promulgating regulations to carry out the purposes of TILA and to make whatever classifications or exceptions as may be necessary to effectuate those purposes. 15 U.S.C. § 1604(a). Congress chose the Federal Reserve Board, which had been established as the nation's central bank in 1913, to be the agency to implement TILA and to promulgate regulations thereunder. Because it understands developments in credit markets, the Board has the institutional expertise to properly establish the requirements for disclosing the terms of credit products to consumers, taking into account consumer interests, the availability of credit, and other

pertinent considerations. H.R. Rep. No. 90-1040, at 18 (1967) ("[n]o one can deny" the "experience and expertise" of the Federal Reserve Board in matters of "finance charges in credit transactions").

One of the primary purposes of the Board's TILA regulation, known as "Regulation Z," has been to classify fees and charges as part of the "finance charge" or as "other charges" under TILA's disclosure requirements, and to distinguish them from fees and charges that are neither part of the finance charge nor other charges. Such classifications enable consumers to compare credit products and enable creditors to comply with the statute's disclosure requirements without being subject to private lawsuits for allegedly improper disclosure of fees.

2. This Court has long recognized the exceptionally broad authority that Congress vested in the Federal Reserve Board under TILA, including explicit authority to fill gaps in the statute through its Regulation Z. In *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980), the Court held that a high degree of deference is due even to interpretations of TILA by the Board's staff that were not promulgated in notice-and-comment regulation. *Id.* at 557, 564. The Court explained: "Because of their complexity and variety, * * * credit transactions defy exhaustive regulation by a single statute. Congress therefore delegated expansive authority to the Federal Reserve Board to elaborate and expand the legal framework governing commerce in credit." *Id.* at 559-560 (citing 15 U.S.C. § 1604 (1976); *Mourning*, 411 U.S. at 365-366). Indeed, the Court expressly noted that the Board "executed its responsibility by promulgating Regulation Z, 12 C.F.R.

Part 226 (1979), which at least partly fills the statutory gaps." *Milhollin*, 444 U.S. at 560.

The Court in *Milhollin* therefore concluded that, "[u]nless demonstrably irrational, Federal Reserve Board staff opinions construing the Act or Regulation should be dispositive * * *." 444 U.S. at 565. Logic compels the conclusion that even greater deference be due here, where the challenged regulation, 12 C.F.R. § 226.4(c)(2), is a provision of Regulation Z itself, and was thus issued pursuant to formal notice-and-comment rulemaking to fill the gaps left by Congress. *See Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 219 (1981) (citing *Milhollin* as requiring deference to Board's regulation implementing TILA "absent some obvious repugnance to the statute").

Subsequent to *Milhollin*, this Court has reaffirmed the high degree of deference due an agency, like the Federal Reserve Board, that is vested by Congress with explicit regulatory authority greater than that typically granted by Congress. In such instances, the Court has held that greater deference should be accorded the agency's regulatory action than is required under the more common *Chevron* standard. When Congress has " 'explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation,' * * * and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) (quoting in part *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984)) (footnote omitted) (citations omitted).

3. TILA demonstrates that Congress gave the Board explicit authority to fill gaps regarding the classification of fees and charges as part of the "finance charge" or as "other charges."

a. From the outset, Congress not only provided the Federal Reserve Board the typical authority to "prescribe regulations to carry out the purposes" of TILA, but also specified that the Board's regulations "may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes [of TILA], to prevent circumvention or evasion thereof, or to facilitate compliance therewith." 15 U.S.C. § 1604 (1964 Supp. V), (currently codified at 15 U.S.C. § 1604(a)). Congress thereby granted the Board express authority to classify fees in a manner that the Board, in its judgment, deems proper to effectuate the statutory purpose or to facilitate compliance. To the extent that a classification is inconsistent with an express provision of TILA, Section 1604 also granted the Board explicit authority to make exceptions.

b. In 1995, Congress confirmed that TILA grants to the Federal Reserve Board the authority to promulgate regulations classifying certain fees and charges as part of the "finance charge" or excepting fees and charges therefrom. In enacting the Truth in Lending Act Amendments of 1995, Congress directed the Federal Reserve Board to prepare a report to "consider the extent to which it is feasible to include in finance charges" all the charges already described in the statutory definition of "finance charge," "especially those charges excluded from finance charges under [Section 1605]." Pub. L. No. 104-29, § 2(f),

109 Stat. 271-272 (1995) (*reprinted in* note following 15 U.S.C. § 1605). Congress also explicitly directed that the Board "shall prescribe any appropriate regulation in order to effect any change included in the report." *Ibid*. *See* H.R. Rep. No. 104-193, at 96 (1995) (explaining that the "definition of finance charge does not currently have a unified approach to fees," and that Congress was "direct[ing] the Federal Reserve Board to reexamine the costs that consumers incur in connection with an extension of credit and to determine how to calculate the finance charge to reflect more accurately these costs").

That directive reflects an understanding by Congress that the Federal Reserve Board enjoys primary interpretational authority concerning whether a particular charge is part of the "finance charge." It confirms that Congress intended the Board to define the contours of "finance charge."[3] It also makes clear that Congress views administrative action by the Board, not litigation, to be the means for resolving interpretational issues regarding which fees are included as part of the finance charge.[4]

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[3] The Board's regulation at issue here, 12 C.F.R. § 226.4(c)(2), was more than a dozen years old at the time of that 1995 congressional directive. Unlike the statutory exclusions in Section 1605 that Congress itself had created and then identified in the directive as warranting special reexamination by the Board, Congress did not identify the Board's regulatory classifications as something that the Board should reexamine. Certainly, if the Board's then-existing regulation regarding the scope of "finance charge" were not consistent with Congress's view of the statutory term or with its view of the Board's authority, one would have expected Congress to have directed the Board to reexamine that regulatory classification as well, but Congress did not do so.

[4] The Board's report in response to the 1995 directive analyzed the statutory framework, various public comments (*see* 60 Fed. Reg. 66,179 (Dec. 21, 1995) (soliciting comments on issue)), and the results of

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c. Other provisions of TILA confirm the Federal Reserve Board's broad authority with regard to disclosure requirements involving the finance charge. In Section 1637(a), Congress required creditors to disclose to consumers "other charges" that are imposed "as part of the plan" and left it to the Board to determine, through "regulations," the contours of such "other charges." 15 U.S.C. § 1637(a)(5). Also, in Section 1637(c)(5), Congress expressly granted the Board authority to go so far as to alter certain statutory disclosure requirements. Congress provided that the Board may, by regulation, "modify any disclosure of information required by" the statutory subsections governing disclosures in applications, solicitations, and renewals "if the Board determines that such action is necessary to carry out the purposes of, or prevent evasions of" any of those provisions. 15 U.S.C.

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meetings on the issue held by its Consumer Advisory Council. The Board acknowledged that there was "considerable appeal" in adopting a simpler approach of including every cost "associated with a consumer credit transaction" as part of the finance charge. Board of Governors of the Federal Reserve System, Report to the Congress, *Finance Charges for Consumer Credit Under the Truth in Lending Act* 10 (April 1996). But the Board ultimately concluded that "[a]ny such major change" would impose an extraordinarily high administrative cost and that the purported benefits did not clearly outweigh those costs. *Ibid.* The Board determined that such a change may not be the best approach to achieve "meaningful disclosures at all stages of the credit process and for all product types," *id.* at 11, and that it could be misleading due to the increase in the APR that would result and could erroneously suggest, for example, "that credit is substantially more expensive than leasing," *id.* at 10-11. The Board also emphasized that such a change in the scope of "finance charge" would require "an extensive consumer campaign of reeducation" or the resultant jump in the APR could "falsely suggest a changing rate environment in the economy." *Id.* at 11. Therefore, the Board did not make recommendations for change, but recommended further study of the matter. *Id.* at 12.

§ 1637(c)(5). *See also* 15 U.S.C. § 1632(a); 15 U.S.C. § 1632(c)(2)(B)(ii); 15 U.S.C. § 1606(c).

These provisions of TILA granting explicit regulatory power to the Board regarding the scope of "finance charges" and "other charges," as well as this Court's precedents interpreting the Board's broad authority, amply demonstrate that, under *Mead* and *Milhollin*, the Board's regulation classifying over-the-limit fees as not part of the finance charge is entitled to judicial deference unless that regulation is "manifestly contrary to the statute," *Mead*, 533 U.S. at 227-228, or "demonstrably irrational," *Milhollin*, 444 U.S. at 565.[5]

B. The Board's Duly Promulgated Regulation Classifying Over-The-Limit Fees As Not Part Of The Finance Charge Is Not Manifestly Contrary To TILA Nor Demonstrably Irrational And Therefore Is Controlling

1. The Regulation Is Not Manifestly Contrary to TILA

The court of appeals erred in concluding that there is no ambiguity "within the statutory definition of a finance

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[5] There is no dispute here that Congress delegated to the Federal Reserve Board, under the first sentence of 15 U.S.C. § 1604(a), authority "generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Mead*, 533 U.S. at 226-227. If that were the only grant of authority to the Board, this case would be governed by the more common *Chevron* test, under which the Court would determine whether the Federal Reserve Board's regulation classifying over-the-limit fees as not part of the finance charge is a reasonable interpretation of an ambiguous statutory provision. We demonstrate below that the Board's regulation meets that standard as well.

charge." Pet. App. A11. The description of "finance charge" set forth in Section 1605(a) does not unambiguously require that over-the-limit fees be classified as part of the finance charge and other provisions in TILA strongly indicate that Congress did not intend for it to so require. Therefore, the Board's regulatory classification of over-the-limit fees as not part of the finance charge is not manifestly contrary to the statute.

a. Congress provided that, for purposes of TILA, "the amount of the finance charge in connection with any consumer credit transaction shall be determined as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit." 15 U.S.C. § 1605(a). That definition, by its terms, does not require that over-the-limit fees be part of the finance charge. Indeed, Congress provided a list of examples of charges that are included in the finance charge. 15 U.S.C. § 1605(a)(1)-(6). Congress also identified some categories of charges that are included in the finance charge only in certain circumstances, 15 U.S.C. § 1605(b), (c), and others that are not included, 15 U.S.C. § 1605(d), (e). None of those lists mention over-the-limit fees, reflecting the fact that TILA's definition of "finance charge" does not unambiguously identify whether such fees are part of the finance charge. *Cf. Mourning*, 411 U.S. at 373 (in light of broad grant of regulatory authority to the Board, declining to infer that references in TILA to certain transactions were intended to limit choice of the Board's treatment of other transactions).

b. Other provisions of TILA expressly provide that not all charges imposed by credit card issuers on consumers are part of the "finance charge." Some charges are

"other charges" and some charges are neither part of the finance charge nor other charges.

In Section 1637(a), where Congress has listed the items that must be disclosed to a consumer before establishing an open-ended credit plan, TILA requires disclosure of information about imposition of a "finance charge," the applicable periodic rate, and the nominal APR. 15 U.S.C. § 1637(a)(1)-(4). As noted above, TILA further provides for disclosure of "other charges." 15 U.S.C. § 1637(a)(5). The reference to "other charges" was included as part of the original statute in 1968, at the same time that the finance charge provision in Section 1605(a) was enacted. 15 U.S.C. § 1637(a)(6) (1964 Supp. V). In 1980, Congress reworded the "other charges" provision to require disclosure of "other charges which may be imposed as part of the plan, and their method of computation, in accordance with regulations of the Board." 15 U.S.C. § 1637(a)(5) (1976 Supp. V).

Thus, TILA distinguishes between charges that are "*imposed * * * as an incident to the extension of credit*" (*i.e.*, "finance charges under Section 1605(a)(5)), and charges that are "*imposed as part of the [credit] plan*" (*i.e.*, "other charges" under Section 1637(a)(5)). This distinction renders the finance charge provision ambiguous with respect to charges and fees that are not expressly identified as part of the finance charge. The statutory framework leaves it to the Board to classify what charges constitute "other charges" under Section 1637(a)(5). This is one of the gaps that Congress intended the Board to fill. *Cf.* 12 C.F.R. Part 226, Supp. I § 226.6(b)(2) (listing examples of charges that are not part of the finance charge nor "other charges").

c. Section 1637(c) expressly refers to over-the-limit fees in terms that strongly suggest that Congress did not

intend to require that these fees be part of the "finance charge," but rather viewed them as "other charges." Congress added Section 1637(c) to TILA in 1988 to require disclosure of certain information in solicitations and applications for both credit cards and charge cards. Congress defined "charge card" as "a card, plate or other single credit device that may be used from time to time to obtain credit *which is not subject to a finance charge.*" 15 U.S.C. § 1637(c)(4)(E) (1988) (emphasis added); *see* 15 U.S.C. § 1637(c)(4)(A)(iii) (1988) (charge cards require that payment for credit extended is due upon receipt of the billing statement). Nevertheless, Congress explicitly recognized that credit obtained under a charge card may be subject to an "[o]ver-the-limit fee," and Congress included that fee in a list of "[o]ther information" that must be disclosed in any written application or solicitation for a charge card. 15 U.S.C. § 1637(c)(4)(B), (C)(i)(II) (1988). The very fact that Congress understood that an over-the-limit fee could be imposed on a type of card that is not subject to a finance charge demonstrates that TILA does not require that over-the-limit fees be treated as part of the finance charge.

Moreover, Congress also explicitly described an over-the-limit fee in Section 1637(c) as "any fee *imposed in connection with an extension of credit*" that is in excess of the authorized credit limit. 15 U.S.C. § 1637(c)(4)(B)(iii) (1988) (emphasis added). Congress did not use the narrower phrase "*imposed * * * as an incident to the extension of credit*," as it had in the "finance charge" definition in Section 1605(a), thereby again demonstrating that Congress did not intend to require that an over-the-limit fee be part of the finance charge. *See also* 134 Cong. Rec. H9808 (daily ed. Oct. 6, 1988); 134 Cong. Rec. H10179 (daily ed.

Oct. 13, 1988) (describing over-the-limit fees as "ancillary fees" that must be disclosed in applications and solicitations in addition to the APR and information about applicable finance charges).

Finally, Congress treated over-the-limit fees similarly in the contemporaneously enacted provisions of Section 1637(c) relating to credit card disclosures in written applications and solicitations and relied on the same statutory description of "over-the-limit" fees. Congress again expressly listed over-the-limit fees under the heading "[o]ther information." It further provided that such fees must be disclosed "[i]n addition to" the minimum finance charges and APR required to be disclosed under the immediately preceding subsections relating to credit cards. 15 U.S.C. § 1637(c)(1)(B)(iii) (1988); *see also* 15 U.S.C. § 1637(c)(3)(B)(i)(II) (1988); 15 U.S.C. § 1637(c)(3)(D)(ii) (1988). Congress thereby evidenced no intention to treat over-the-limit fees for credit cards differently than it did for charge cards.

In view of these many features of TILA's text and structure, it cannot be said that Section 1605(a) precludes over-the-limit fees from being classified as something other than part of the finance charge because such fees (1) are not included in Section 1605(a) as an example of part of the finance charge; (2) are described by Congress in Section 1637(c) in express statutory language that is different from the statutory language used to describe the finance charge in Section 1605(a); and (3) are identified by Congress in Section 1637(c) as "other information." The references to "over-the-limit fees" in Section 1637(c) create a serious ambiguity as to whether the term "finance charge" in Section 1605(a) includes over-the-limit fees. *Cf. Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (relying on the

"normal rule of statutory construction that 'identical words used in different parts of the same act are intended to have the same meaning.'") (quoting *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986) and earlier cases). For these reasons, the Board's regulation is not manifestly contrary to the statute.

2. The regulation is not demonstrably irrational

a. The Board duly promulgated 12 C.F.R. § 226.4(c)(2) in 1981, as part of its Regulation Z, to classify over-the-limit fees as not part of the finance charge. At the same time and in the same manner, the Board promulgated the provision that requires disclosure in periodic billing statements of all "[o]ther charges," *i.e.*, the "amounts, itemized and identified by type, of any charges other than finance charges debited to the account during the billing cycle." 12 C.F.R. § 226.7(h). Both provisions were promulgated pursuant to formal notice-and-comment rulemaking, 5 U.S.C. § 553, as part of the Board's complete revision of Regulation Z that was necessitated by Congress's enactment of the Truth in Lending Simplification and Reform Act (1980 Simplification Act), Pub. L. No. 96-221, Title VI, 94 Stat. 132, 168 (1980). The Board's revision to Regulation Z was "the culmination of several years of effort to reduce the difficulties of compliance, to clear up troublesome ambiguities that had been the source of much litigation, and to make credit disclosures more meaningful to consumers." Board of Governors of the Federal Reserve System, 68th Annual Report 149 (1981). In particular, one "major aspect[ ] of the Board's effort to reduce compliance burdens include[d] the adoption of

clear-cut rules" that the Board hoped would "require less interpretation and thereby reduce litigation." *Ibid.*

b. The over-the-limit fee regulation appropriately carries out the purposes of TILA and is a classic example of the exercise of explicit regulatory authority to fill a statutory gap and make "classifications" to "effectuate the purposes" of TILA or to "facilitate compliance therewith." 15 U.S.C. § 1604(a). *See* Pet. App. A22 (Edgar, Chief D.J., concurring in part and dissenting in part) (the Board's regulation "filled in a blank left by Congress in the TILA").

The district court below correctly recognized that the regulation classifies as not part of the "finance charge" several "categories of charges, all of which arise when the terms under which the credit was extended have been breached by the borrower," including unanticipated late fees, fees for exceeding a credit limit, and charges arising out of delinquency or default. Pet. App. A28. "All of these post-credit extension occurrences are done in violation of the agreed upon terms upon which the credit was extended. Such charges are never imposed upon a borrower who simply follows the terms of the agreement." *Ibid.* Because these charges are based on a breach of the agreement by the borrower, the Board could rationally include these charges as one of the classes of charges that are not part of the finance charge.

The court of appeals' contrary approach introduces an issue of "knowingly" into the determination whether an over-the-limit fee is part of the finance charge. The court of appeals emphasized that its requirement that over-the-limit fees be disclosed as part of the finance charge "is of course limited to those instances in which the creditor knowingly permits the credit card holder to exceed his or

her credit limit and then imposes a fee incident to the extension of that credit." Pet. App. A15 n.5. But mandating such a case-by-case determination would mean that an over-the-limit fee sometimes would be classified as part of the "finance charge" and included in the APR on a consumer's periodic billing statement, but at other times would be classified as an "other charge" and not included in the APR, even in a subsequent periodic billing statement for the same account.

That approach would confuse consumers and not assist in their understanding of the finance charge or APR. It would be inconsistent with Congress's goal of having disclosures made in a uniform manner, so as to enable consumers "to compare more readily the various credit terms available" to them. 15 U.S.C. § 1601(a). And it would be contrary to the Board's intent that Regulation Z "improve the delivery of credit-shopping information to consumers, * * * reduce costs related to compliance litigation, and redirect enforcement efforts to the most important matters." Board of Governors of the Federal Reserve System, 67th Annual Report 171 (1980). Therefore, the Board was well within its authority to consider such consequences in deciding to classify over-the-limit fees as "other charges."

c. Discerning whether a creditor "knowingly" permitted a consumer to exceed the credit limit in any particular instance, as the court of appeals would require, is an exceedingly difficult undertaking because of the way that these transactions are authorized. For example, authorizations through Visa and MasterCard were established to provide the merchant's bank some assurance that the credit card charge will be accepted by the credit card issuer. The issuer generally may not refuse to accept a

cardholder charge that it has authorized, and the merchant's bank bears the risk if there was no authorization by the Visa or MasterCard system. But that authorization process does not authorize the cardholder to exceed his credit limit. Thus, the court of appeals clearly erred in viewing the authorization system as a means by which a consumer and his credit card issuer "renegotiate" the terms of a credit account. *See* Pet. App. A13.

The authorization system cannot, and is not designed to, determine whether a particular charge, at a given time, will cause an account to exceed its credit limit. That is because some merchants such as car rental agencies request authorization for amounts that exceed the amount of the actual transaction. Others may request authorization for transactions that are never completed or for nominal amounts that are much less than the actual transaction that is carried out. Some merchants do not seek authorization at all for some transactions. *See* Br. for *Amici Curiae* American Bankers Association, *et al.* Supp. Pet. for Cert. 8, 15-16 (Feb. 4, 2003) (providing a more detailed description of authorization process). Also, the computer systems for authorizations do not have continuous real-time information regarding all charges, credits, and payments which may be in transit, or may not yet have cleared through the processing system. *See id.* at 8-9.

d. The court of appeals' uncertain "knowingly" standard resurrects an approach that the Federal Reserve Board rejected as inappropriate in 1981, when it promulgated its over-the-limit fee regulation. As noted above, that regulatory action was necessitated by Congress's enactment of the 1980 Simplification Act. The need for simplification and reform had come about, in

part, because of the uncertainty surrounding what fees are part of the "finance charge." In the early years following the 1968 enactment of TILA, there was an "explosion of lawsuits," including "countless suits over hairsplitting nuances of disclosure." Ralph J. Rohner & Fred. H. Miller, *Truth In Lending* 787 (2000). Requests for agency guidance yielded "more than 1,500 official and unofficial interpretations" by the staff of the Federal Reserve Board "of what Regulation Z required." *Ibid.* That "vast subbody" of jurisprudence, as well as judicial decisions that sometimes conflicted with those interpretations or with one another, meant that "[c]ertainty of compliance was impossible." *Ibid.*

The Board's initial proposed rule in 1980 would have added over-the-limit charges to the pre-existing regulation that classified late fee charges and charges for delinquency, default or similar occurrences as part of the finance charge, only if they were imposed for such an occurrence that was "actual" and "unanticipated." 45 Fed. Reg. 29,702, 29,735 (May 5, 1980). When the Board issued its second proposed rule for comment, however, that provision was changed to classify over-the-limit fees as not part of the finance charge without consideration of whether such a fee was unanticipated in a particular case. 45 Fed. Reg. 80,648, 80,697 (Dec. 5, 1980).

The modification regarding how to classify over-the-limit fees was in keeping with one of the substantive changes reflected in the second proposed regulation and emphasized by the Board, *i.e.*, that "[d]isclosures would be based only on the legally enforceable obligation between the parties, not on any unenforceable understanding which is at variance with the contract" between the consumer and the creditor. 45 Fed. Reg. at 80,650. That

shift was consistent with what the Board understood to be "the thrust of the Truth in Lending Act as amended," which is "to provide customers with an accurate picture of the obligation to which they will be legally bound." 45 Fed. Reg. at 80,677. Thus, even if the court of appeals were correct in its theory that respondent alleged that petitioner knowingly imposed the over-the-limit fee on respondent based on some understanding between them about an additional extension of credit, *see* Pet. App. A12-A13, the Board was well within its broad authority discussed above when it classified all over-the-limit fees as not part of the finance charge, but required disclosure as an other charge. *Cf. Lopez v. Davis*, 531 U.S. 230, 244 (2001) (agency "has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority," and agency "is not required continually to revisit 'issues that may be established fairly and efficiently in a single rulemaking proceeding'") (citations omitted); *see also Mourning*, 411 U.S. at 374 (recognizing necessity of administrative line-drawing under TILA because "the transactions or conduct which Congress seeks to administer occur in myriad and changing forms").

e. Finally, the Board's determination that an over-the-limit fee should not be disclosed as part of the finance charge rationally furthers the interests of consumers. As explained above, the Board requires that such a fee be separately disclosed as an "other charge" and itemized on periodic billing statements. 12 C.F.R. § 226.7(h) (requiring disclosure of "[t]he amounts, itemized and identified by type, of any charges other than finance charges debited to the account during the billing cycle"). That separate disclosure of an over-the-limit fee highlights for the

consumer the amount of and type of fee charged and identifies it as a charge that is incurred only if the customer exceeds the terms of the credit limit, not as a regular monthly charge whenever any credit is extended under the account.

To include an over-the-limit fee as part of the finance charge on a periodic billing statement "would substantially increase (and distort) the APR for the billing cycle in which they were imposed." Board of Governors of the Federal Reserve System, Report to the Congress, *Finance Charges for Consumer Credit Under the Truth in Lending Act*, at 3 (April 1996) (making same point with regard to why certain other fees are not included in the finance charge). That distortion would occur because imposition of an over-the-limit fee does not reflect a step-up in the interest rate charged on the account. An over-the-limit fee typically is a fixed amount, $29.00 in the case of respondent's account, Pet. App. A36, and is unrelated to the amount of any extension of credit. Credit card issuers generally do not impose over-the-limit fees on every transaction that causes an account to exceed the credit limit at a given time. They typically impose over-the-limit fees only when the account balance exceeds the credit limit at the end of the billing cycle, or for a period of several weeks or days. If a transaction causes the account to exceed the credit limit temporarily and the credit card issuer receives a payment from the consumer before the end of the billing cycle, the issuer often does not impose any over-the-limit fee.

Adding such a fee to the APR would likely confuse consumers. Today, most consumers receiving solicitations offering a credit card account already have one or more credit cards. These consumers need to be able to compare

the terms of their current accounts with the terms of accounts offered to them. As explained above, TILA requires that over-the-limit fees be disclosed separately from the APR and the minimum finance charge on written applications and solicitations for credit cards. *See* 15 U.S.C. § 1637(c)(1), (3). Thus, a consumer comparing the APR on his billing statement to the one on an account that is offered to him in an advertisement or a direct solicitation would be misled about the comparative costs of credit if an over-the-limit fee were included in the APR on the billing statement.

By contrast, the Board's requirement that the over-the-limit fee be separately disclosed in billing statements, as it was indisputably done on respondent's billing statements, is consistent with the statutory provisions requiring separate disclosure of over-the-limit fees on credit and charge card applications. It is likewise consistent with the Board's regulation, 12 C.F.R. § 226.5a(b)(10), requiring the disclosure of over-the-limit fees on or with an application to open a credit or charge card account. The Board's over-the-limit regulation means that the nature of an over-the-limit fee is highlighted for the consumer on his periodic billing statement and can be easily compared to similar fees under other credit offers or plans.

The above demonstrates that the Board's regulation classifying an over-the-limit fee as not part of the finance charge was lawfully promulgated, is not manifestly contrary to TILA or demonstrably irrational and, therefore, is controlling.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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